

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
A Court Publication Supported by the Attorney Admissions Fund
Vol. XIII, No. 4, April 2, 2007

Employment

Action for employment discrimination and retaliation based on disability, in violation of ADA and Oregon law; interference with plaintiff's rights under the FMLA and OFLA; and wrongful discharge. Judge Hubel granted defendants' motion for summary judgment on all claims.

Plaintiff alleged that she was disabled by sleep apnea and chronic obstructive pulmonary disease. Defendant asserted that she was terminated for job performance issues. Court held that plaintiff failed to establish disability because her testimony that sleep apnea caused her to fall asleep at work, affected her memory, caused her to make errors at work, and adversely affected her disposition was contradicted by her own testimony and

statements made to the employer denying that her work performance deteriorated, that she made mistakes, and that she had difficulty getting along with others, and asserting that she had taken on challenging tasks, covered for other employees, and performed her work duties accurately. The court also found her claim that she had a "record of" a disability unsubstantiated.

Plaintiff's retaliation claim was dismissed for failure to introduce any direct or indirect evidence that the employer's explanation for her termination was pretextual. The court dismissed the FMLA interference claim because there was no triable issue of fact that plaintiff's taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. The court dismissed the OFLA claim, holding that there is no cause of action under OFLA for retaliatory discharge.

Mortensen v. Pacificorp.,
CV 06-541-HU
(Opinion, 2/1/07)
Plaintiff's Counsel:
Matthew Duckworth
Defense Counsel:
Calvin Keith

Section 1983

Plaintiff alleged claims of violation of 42 USC § 1983 against police officers for lack of probable cause to arrest and excessive force, as well as § 1983 claims against the city for failure to adequately train, supervise and discipline the officers, and claims against the city for negligence, assault and battery. Defendants moved for summary judgment.

Plaintiff's § 1983 claim against the officers for arresting him without probable cause was barred by the *Heck* doctrine because plaintiff had pled no contest to the charges of interfering with a

2 The Courthouse News

police officer and resisting arrest. However, *Heck* did not bar plaintiff's excessive force claim against the officers because the record did not reveal whether plaintiff's no contest pleas were based on the same facts. The court found that the amount of force used by the officers while attempting to secure plaintiff in handcuffs was objectively reasonable when faced with a man they had observed drinking what appeared to be an alcoholic beverage in violation of a city ordinance, ignored their requests, pulled away at the sight of handcuffs, resisted being pushed down on the sand and had rigid arms. Since the § 1983 claims against the officers did not survive summary judgment, the § 1983 claims against the city were also dismissed.

Finally, the court found that the state law claims of assault, battery and negligence were barred by the statute of limitations. *Sjogren v. City of Seaside, et al.*, CV 05-1478-ST (Finding &

Recommendation, 10/18/2006, adopted by Judge Brown, 1/19/07)
Plaintiff's Counsel: J. Clay McCaslin
Defense Counsel: Gerald Warren

Fugitive Disentitlement Doctrine

Judge Panter refused to dismiss a civil rights action by a former inmate. While the action was pending, the plaintiff allegedly violated his post-prison supervision by failing to report to his parole officer. A warrant was issued. Defendants immediately sought to have the case dismissed under the fugitive entitlement doctrine. Judge Panter denied the motion, citing: (1) the lack of a nexus between the PPS violation and the pending civil rights action; (2) insufficient evidence that the plaintiff was in fact a fugitive; and (3) the moving party's failure to show any prejudice. *Etherly v. Oregon*, CV 04-996-PA (Opinion, 2/19/07)
Plaintiff Pro Se
Defense Counsel: Jacqueline Sadker

Statute of Limitations

Plaintiffs in these consolidated cases allege that they were sexually abused by their Parole and Probation Officer when they were under the jurisdiction of the Oregon Youth Authority. The Officer has been convicted for offenses committed against some of the plaintiffs. The State moved for summary judgment on statutes of limitations grounds against some plaintiffs. Judge King concluded that there was a material issue of fact on whether equitable estoppel should apply, based on threats the Officer made to the youths concerning his ability to imprison them if they reported the abuse. *Duncan v. State of Oregon* CV 05-1747-KI (lead case) (Opinion, 3/14/07)
Plaintiffs' Counsel: Robert Thuemmel
Defense Counsel: James Smith

3 The Courthouse News